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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-190

GREGORY VAN HALL,
Petitioner

versus

THE COMMONWEALTH OF VIRGINIA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE VIRGINIA SUPREME COURT

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PETITION FOR WRIT OF CERTIORARI TO THE VIRGINIA SUPREME COURT

Petitioner prays that a writ of certiorari issue to review The Virginia Supreme Court's refusal to grant a writ of error in the above stated case on May 7, 1975.

Citations to Opinions Below

No published opinion exists in this case other than the decision The Trial Court found in the Transcript.

Jurisdiction

The Virginia Supreme Court denied the Petitioner a writ of error on May 7, 1975. The jurisdiction of this court is invoked under 28 U.S.C. §1257(3).

Questions Presented

(1) Whether in a probation revocation hearing, where there are genuine factual disputes over the grounds of revocation, this transforms such a hearing from a quasi-criminal administrative type hearing into a full judicial hearing with the full panopy of procedural and substantive rights being afforded to the defendant?

(2) Whether in such a hearing the standard of evidence which must be applied is the standard of proof beyond a reasonable doubt?

(a) Whether the evidence presented by the Commonwealth in support of such revocation was insufficient as a matter of law as an invalid presumption and thus could not support the revocation?

(3) Whether the basis of the revocation, namely that the probation officer disapproved of the defendant's life style, which he characterized as "hippie" and part of the drug culture was so vague as to be violative of the Due Process Clause of the Fourteenth Amendment?

(a) Whether a probation officer's disapproval of the life style, dress, personal appearance, place of home, etc. can be a basis of revocation of probation?

Statement of the Case

In October, 1970, the defendant was convicted in the Circuit Court of Albemarle County, Virginia on the charge of breaking and entering and was given both penitentiary time and suspended time. As part of the suspended sentence, one of the terms of probation was that the defendant would not use drugs or associate with those known to use or sell drugs.

In October, 1971, the defendant was released from incarceration and he was placed on probation as to his suspended sentence time. On May 30, 1974, a representative of the Virginia probation-parole office, plus a deputy sheriff of Albemarle County, Virginia came to the defendant's newly rented home near Keswick, Virginia on the authority of the probation officer and conducted a warrantless search of the premises. During the course of such search, a pipe and some other materials were found at the bottom of a packing box containing drapes and other goods which had just been brought to the house during the move by the petitioner's wife. A laboratory report showed that the pipe bowl and a small stick there tested positively for marijuana. (T.–3) The reason for the search was that the probation officer heard that the defendant had been acting strangely on his job and he wanted to see if the defendant was using drugs again. (T.–6) The defendant consented to the search.

The defendant was then charged with violation of probation on three counts. The first was even though the defendant had denied knowledge of the pipe, he had a previous involvement with drugs. (T.–2, 9, 10) The second ground was the "life style that he was pursuing immediately preceding the day the search was made." (T.–2, 4, 5, 7) Third, possible erratic behavior he was having on his job. (T.–2)

On July 24, 1974, full hearing was held on the merits of the probation revocation charge before the Honorable David F. Berry, Judge of the Albemarle County Circuit Court.

The only evidence presented against the defendant was the testimony of Mr. John Wade, the probation officer who con-

ducted the search. The evidence presented by Mr. Wade was first the results of the search, to wit, the marijuana pipe. Evidence on the second charge concerning the life style is found in the following testimony on Pages 4 and 5 of the transcript:

Q. All right, go into the life style, explain to the Judge what you mean by that?

A. Well first of all his physical appearance is consistent with that of a lot of other people in the drug scene. To be specific just the dress, the hair, the beard, and so forth, the physical location of his . . .

Q. I notice that he does not have that appearance today?

A. No, he does not. The appearance that he presents today is not the appearance on May 30th at the time of the search. It's drastically different.

Q. All right, go ahead with his clothes?

A. Well that type of attire that we generally associate with the hippie culture, his residence which is in a fairly remote area, of 250, an area known as the Collina estate which there are several residences and they are all occupied by people of similar appearance. This trappings, the furnishings within his home, his — has all the characteristics of someone who could possibly be involved in the drug culture. In other words they projected certain image . . .

Q. You mentioned to me that he had a dog?

A. Yes and the fact is he has or had at the day of the search a rather aggressive German Shepherd dog that did not permit us to leave the car to make the search until he brought the dog under control is also pretty technical of these people who are in the drug scene. This is based on my limited experience in dealing with people in the drug scene

> as a Probation and Parole Officer. I want to emphasize that.

Finally, the probation officer testified that he had talked to the defendant's employer, the owner of a convenient food store where the defendant was acting as deputy manager, who stated that the defendant was having some difficulties at work. (T.–5, 6) The probation officer further indicated that he had never talked to the defendant about problems at work prior to bringing these charges. (T.–10)

The defendant presented evidence in rebuttal on each and every point made by the probation officer.

As to the question of the introduction of the drug paraphernalia in the defendant's home, it was agreed by all parties, including the Judge (T.–88), that such introduction was apparently accidental and without the knowledge or approval of the defendant. The petitioner's wife picked up some sheets that had been in storage for a long time at a friends house and these items were at the bottom along with other items not belonging to the petitioner. (T.–29) The petitioner did not even know the box had been brought to the house, much less it contained drug paraphernalia. (T.–31)

The court accepted the fact that the introduction was apparently accidental or without the defendant's knowledge, but found the defendant guilty on the other two questions, namely his life style and the fact that he was having some difficulties on the job. The Court's salient ruling is as follows:

> All right, come around Mr. Hall. Mr. Hall I think the Court should state for you and the record that the complaint made in the case today chiefly expressed by Mr. Wade is as much involved with your conduct and behavior and appearance prior to the search of your premises as it is involved with the results of that search, that is as far as the Court is concerned. You were a probationer and while I find some indication that this might have been an accidental type of occurrence with the drug paraphernalia showing up in your

house, I cannot overlook the fact that an experienced and trusted probation officer of this Court says in effect that everything about you took on the appearance of the same drug culture which this Court warned you about when you were up for it before. The evidence is that you broke away from it and have broken away from it more clearly after Mr. Wade conducted this search and made this complaint against you. That's the thing that makes it so difficult. Here you are now for the first time showing some responsibility but you didn't do it until the probation officer kicked you right back in the Court. And if I didn't do something with you, you would think that that didn't mean anything either. The fact is I'm convinced that you never really faced up to the fact that you were under the gun. And this is the most tragic time of all to deal with you as a probation violator. Here you are with a young wife and about to have a family and prospects of advancement and a good job and you wind up on a probation violation which indicated that when you presented yourself to Mr. Crafaik and to Mr. Worley you were not a fit subject to be on probation because as prospective employers they were not satisfied with your appearance and as a condition to your getting a job they require you to change it, the very thing that I warned you about. I don't know what it takes to get through to you. The only means that I have is to put punishment on you and to tighten the squeeze and to me it's the most tragic thing of all that the punishment usually occurs after the subject has faced up to it and is ready to make a change. But if punishment is not imposed then the whole system fails. And I have to deal with you as part of the probation system. I find you guilty of a probation violation, of numerous probation violations in fact, one having to do with an inaffective effort to maintain a steady job up to the time this complaint was made because at the time Mr. Wade conducted the investigation you were about to be dismissed from your then job. I find that you have not measured up to the clear standard that the Court had prescribed to you on the date of September 14, 1973 and I find that coupled with the general testimony of Mr. Wade there is every reason for this Court

> to believe that you have in fact been involved with the use of marijuana. Everything he has to say may be just an overall judgment but that's what the probation officers do. If they couldn't do that we couldn't operate under probation. The Court therefore revokes the previous suspension of your sentence and I am going to undertake to deal with you in the light of what you have already served. (T.–88–80)

After the trial Judge rendered the verdict, the petitioner moved that it be set aside on the grounds that the Commonwealth had failed to produce evidence that the defendant violated the given terms of his probation and that the grounds for which it was revoked were grounds which were not conditions of his probation. These motions were rejected.

Finally, an appeal was made to the Virginia Supreme Court. On May 7, 1975 a Petition for Writ of Error was denied by that Court.

When and How the Federal Questions were Raised and Decided Below

The federal issues concerning the sufficiency of evidence to support a revocation as a matter of due process, plus constitutionality of the actual grounds of revocation, raised both an argument at the trial level, plus were raised in the Petition for Writ of Error in the Virginia Supreme Court. No allegation was made in opposition to the petition that the issues were not raised sufficiently at the lower level.

Reasons for Granting the Writ

Certiorari should be granted because this case raises in the most direct way possible issues concerning the one area with regard to the basis under which probation can be revoked which has not yet been the subject of litigation. This area of course is the substantive basis of probation revocation and the subsidary question of the standards of proof necessary to justify such a revocation. This Court has previously determined that

probation revocation is the proper subject of its decisions and it has held that certain measures of due process, including the right to have an attorney present are required before probation can be revoked in situations in which there are genuine disputes of fact. The question that the Court has left open are where there are genuine disputes of fact, what standards of proof should the State show in order to justify revocation and, taking it one step further, even if in a given situation, the State meets the required burden of proof, are there certain substantive charges which on their face could not be the basis of revocation as a matter of law? This case is unique in that the petitioner did not have his probation revoked for the commission of any subsequent crime, nor for the violation of any specific other term of probation, such as failure to hold a job or to keep in contact with the probation officer. What the petitioner had his probation revoked for was a determination on the part of the probation officer that his life style was indicative of that of a "hippie" and part of a "drug culture" and from that he surmised in the absence of any proof that the petitioner was still involved with drugs. Such a fact situation granted may be extremely unique, though one suspects that this has happened more often than is imagined and what it does is present this Court with a unique opportunity to a set parameter of conduct insofar as to state power and control over the life of a probationer and the subsequent right to revoke such probation.

I

In a probation revocation hearing, where there are genuine factual disputes on the grounds of revocation, this transforms such a hearing from a quasi-criminal administratve type hearng into a full judicial hearing with the full panopy of procedural and substantive rights being afforded to the defendant.

For the Court to make a proper evaluation of the real significance of the issues which are being raised in this petition, the first question which must be examined by this Court is what is the exact legal nature of a probation revocation hearing? If this Court determines at the outset that a probation revoca-

tion hearing is simply an administrative matter in which the probation officer and the presiding judge have absolute and unfettered discretion to revoke in whole or part the probation of a defendant upon the mere allegation of violation of the terms of said probation or parole, or upon grounds not even part of the probation, then of course what is being raised in this petition would be of no consequence. See *Papachristou v. Jacksonville*, 405 U.S. 156, 168 (1972). However, an examination of the most recent pronouncements of this particular point shows very clearly that a probation revocation hearing in certain circumstances, while not fully a trial in the classical Sixth Amendment sense, in that there is not a right to a jury, at least not in Virginia, Va. Code Ann. §53-284; nevertheless, is a proceeding far more important than a mere administrative hearing in which most, if not all, of the other requirements of the Sixth Amendment apply? See *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Mempa v. Ray*, 389 U.S. 128 (1967).

While most of the opinion in both *Gagnon and Morrissey* concerns the formalities of procedural due process which would be applied in a probation or parole revocation hearing, we will not discuss these except in passing since there is no claim made by the petitioner that he was in any way deprived of any form of procedural due process in his hearing. However, what is important to this case about the rulings with regard to procedural due process is that they establish beyond any doubt the fact that when we are dealing with matters as serious as these involving deprivation of one's liberty, such cannot occur by administrative fiat, but only after a hearing, thus giving a constitutional underpinning to the entire process.

While this Court has held that probation and parole system has certain benevolent aspects of it which in many ways are similar to the juvenile system, See *In Re Winship*,, 397 U.S. 358 (1970), "the benevolent aspects of the probation or parole system changes whenever revocation is recommended." 411 U.S. at page 780. In such a situation the Court held that everyone then has an interest in finding out the facts which underlie the basis of the recommendation for revocation.

In looking at the general concept of the basis of recommenda-

tion, the Court in both *Morrissey and Gagnon* found that there are two different types of situations. The first situation is where a parole or probation revocation is recommended on the basis of the fact that the defendant has been convicted of a subsequent offense of such magnitude and seriousness as to be a clear and unalterable violation of the terms of parole or probation. While the Court need not specify what offenses would be of that nature, it is pretty clear that the old concept of a crime involving "moral terpitude" would be the standard in such situations.

In such situations this Court has ruled that it is not necessary to give a defendant the full panopy of rights of procedural due process simply because there are no factual questions in issue and, even if the basis of authority for the conviction was being challenged, the probation revocation Court would not have the authority to overturn such convictions. In such circumstances the very fact of conviction becomes an almost irrebuttable presumption of a violation of the terms of probation, thus obviating the necessity for a formal fact finding hearing.

However, in those circumstances where the factual basis for the application for revocation is clearly disputed, the Court has held that the full measure of the procedure of due process must be given to the defendant, including the appointment of counsel. See *Morrissey v. Brewer,* supra at page 475.

From this holding several important conclusions logically flow which have major application to this particular case. First of all, where there are major factual disputes and where a defendant has been mandated in his full rights of procedural due process, it will then logically follow and indeed it is unavoidable that a Court sitting in such a situation is sitting as a Court rather than as a mere administrative tribunal. In examining the facts in this case which we shall detail later, it is very obvious that the factual basis of this case is very much in contest. The second and we feel even more significant conclusion that flows from the affording of procedural due process is that where a Court is sitting as a Court those rules concerning the basis of the substance of the decision, including the

sufficiency of the evidence and the viability in a legal sense of the charges against the defendant also apply, thus further limiting the discretion an individual judge might have in a probation revocation proceeding. As we shall further show in this petition, both the question of whether this evidence was sufficient to support a finding of revocation and whether the charges against the defendant were in themselves legitimate grounds for revocation have been severely brought into question.

II

In such a hearing the standard of evidence which must be applied is the standard proof beyond a reasonable doubt.

In determining whether or not the Court erroneously revoked the defendant's probation or a portion thereof, the next matter which must be examined is the question of the evidence, namely whether or not there was sufficient evidence to support such a revocation. In examining that, the issue which is paramount in mind is what are the standards for evidence in regard to probation revocation hearings. This is an extremely crucial question, one which is not subject to easy answer because just as there is a certain amount of uncertainty as the exact nature of the probation revocation hearing, it would likewise follow that there is equal uncertainty as to the standard of proof which must be met in order to sustain a revocation and probation. Only when a decision is made as to the standard of proof can the Court make a determination as to whether or not in terms of the government's own charges such changes were proved.

In the first argument of this petition, we alleged that where there are disputed factual situations, at least for due process purposes, of a regular full-blown Sixth Amendment trial. Thus it would stand to reason, and indeed is our position, that just as full due process must be given in such a situation, then likewise in such situations the standard of proof, in order to justify a revocation, is no different than in a Sixth Amendment trial.

Ironically, in those situations where revocation is sought because the defendant committed a subsequent crime and was convicted of that crime, there is in fact no evidence problem because the existence of the new conviction is of itself a prima facie evidence in any court, meeting any standards of proof. Thus, while in such a situation procedural rights may be dispensed with, the standard of proof is really beyond a reasonable doubt and the existence of the conviction provides that evidence. Thus, the question to be answered is whether the same standard applies where there are disputed matters of fact. I do not think that the Court can find it any other way but that is does apply.

The law concerning revocation and probation after all is relatively recent, especially insofar as the higher federal courts are concerned, and in those situations they have been dealing exclusively with procedural due process. See *Gagnon v. Scarpelli*, supra; *Morrissey v. Brewer*, supra. Thus, in order to determine what the standard of evidence should be, it will be necessary to look at other types of proceedings which are closely analogous to that of the probation revocation proceedings to see if a standard of proof was applied in those situations which would be applicable here. An examination of the case law shows that this Court in *In Re Winship*, 397 U.S. 358 (1970) ruled on that very point, holding that in juvenile proceedings where the crime charged would be the equivalent of a felony if committeed by an adult, in such situations in order to prove the juvenile guilty, the standard of proof must be beyond a reasonable doubt. As Mr. Justice Brennan stated:

> The use of the reasonable doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be alloted by a standard of proof that leaves people in doubt whether innocent men are being condenmed. It is also important that in our free society that every individual going about his ordinary affairs is confident that his government cannot judge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

> Lest there remain any doubt about the constitutional stature of the reasonable doubt standard we exclusively hold the due process clause presents the clause against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.
>
> Return to the question of whether juveniles, like adults, are constitutionally entitled to proof beyond a reasonable doubt when they are charged with a violation of the criminal law. The same considerations that demand extreme caution in factfinding to protect the innocent adult apply as well to the innocent child. *In Re Winship* pages 364, 365.

With such a ringing application by the Court of the beyond a reasonable doubt standard to juvenile court proceedings, the question is whether this has any application to the question of probation revocation proceedings. It is the petitioner's position that not only does it have application, but of all the proceedings to go in the courts, the juvenile court proceedings is the closest in all respects to that of probation revocation hearings.

First of all, in its basic set-up, the juvenile court system, like the probation and parole system, is considered to be a benevolent social service rather than a criminal proceeding. The Court makes that very clear in *Morrissey v. Brewer,* where it talks about the parole and probation system as being basically a benevolent system. Likewise, where the aim of a particular action within the system is simply the maintainance of the defendant within the system, such as the putting of a juvenile on probation or the sending of an adult defendant to a half-way house or to continued probation with newer and stricter terms, no one has raised the question that here is a full-blown criminal type procedure which requires the full panopy of constitutional protection and the necessity of evidentiary type hearings. Let us make it very clear that nothing in this petition will in any way affect these basic fundamental interests of the probation system.

However, where the juvenile system is attempting to try a juvenile for a crime which would be a felony if committed

by an adult and even though the matter is kept within the juvenile system, the possibility of deprivation of liberty by sending the youngster to a detention home or reform school and where the system is simply trying to revoke the probation and parole, the two systems now are performing a similar function and it would be very difficult to discern where one would be different from the other. Thus, if the standard of proof in a juvenile case is a standard of beyond reasonable doubt, then the standard of proof for probation revocation hearings would likewise have to be beyond a reasonable doubt.

In applying this standard, it should be emphasized that this would not effect the basic interests of the state in setting up a probation parole system. This issue which the late Justice Harlan concerned himself with in the concurring opinion of *Winship* would be applicable here. However, as stated previously, the imposition of the beyond a reasonable doubt standard is first of all limited, at least in those situations where it is intertwined with the standards of due process of law as spelled out in *Morrissey* and *Gagnon* to only those situations where there is a genuine dispute of facts and where the result of a finding against the defendant would be to deprive the defendant of liberty.

Besides the juvenile court system, this Court has also established standards for burden of proof in quasi-criminal matters, such as deportation hearings. In *Woodby v. Immigration Service*, 385 U.S. 276 (1966), the very question was the sole issue before the Court. In that case, the Court held that while deportation proceeding is not a criminal prosecution, ". . . it did not syllogistically follow that a person may be banished from this country upon no higher degree of proof than applies in a negligence case." 385 U.S. at 285. See also *Rowoldt v. Perfetto*, 355 U.S. 115 (1958).

This Court then found that in such matters as denaturalization cases, *Schneiderman v. United States*, 320 U.S. 118 (1943) or expatriation cases, *Gonzalez v. Landon*, 350 U.S. 920 (1955), the burden of proof is that of clear unequivocal and convincing evidence. It went on to hold that that must be the same proof in deportation hearings.

Thus, as stated before, all such matters which would have as a result only the keeping of the defendant within the probation-parole system, even if it included the maintaining of the defendant on probation and parole beyond his original term or under stricter regulation of behavior is not what is contemplated in asking for this standard.

Likewise, it would not require that the state prove more than the existence of a subsequent conviction in order to sustain the revocation and that the introduction of the evidence of such criminal conviction would satisfy the standard of proof in any situation.

Likewise, it is in some ways equally justified to state that where the state wishes to revoke a probation or part of it and send the person back into incarceration in situations where the defendant has not been convicted of a criminal act or at least not convicted of a serious criminal act, then in such situations the burden of proof should certainly be on the state to justify such activities and that the mere existence of the charge being brought against the defendant is not prima facie evidence of the violation of probation. See *Tot v. United States*, 319 U.S. 463 (1943); *Thompson v. City of Louisville*, 362 U.S. 199 (1960); *Garner v. Louisiana*, 368 U.S. 157 (1961). Thus, if the government cannot prove beyond a reasonable doubt that the defendant violated the terms of probation, then it should not be able to revoke the probation.

(A)

The evidence presented by the Commonwealth in support of such revocation was insufficient as a matter of law as an invalid presumption and thus could not support the revocation.

While a detailed recitation of the evidence presented in the case is inappropriate for this petition, nevertheless, leaving aside the constitutionality of the charges themselves, we believe that major constitutional issues concerning denial due process of law are raised by the nature of evidence presented

by the Commonwealth in support of the revocation. *Douglas v. Buder*, 412 U.S. 430 (1973).

What the holdings in *In Re Winship*, supra, and *Thompson v. Louisville* hold, if nothing else, is that while questions of disputed facts are matters for the trier of the case to decide, there must be a certain level of evidence to justify a conviction. In this situation, those facts which were generally in dispute and which could have led to a proper revocation were actually decided in favor of the petitioner. (T.–85) What the revocation was based upon was unsupported allegations, suppositions and presumptions as a result of a subjective determination of the probation officer on otherwise harmless conduct was somehow transformed into violation of an unneeded probation rule. In effect, what the probation officer had done in the Court was to make in effect an irrebuttable presumption that a person living a certain life style and dressing in a certain way is involved in drug traffic, even though not one sintilla of evidence was presented in support of that position. See *Tot v. United States*, 319 U.S. 463 (1943); *Leary v. United States*, 355 U.S. 6 (1969); *Barnes v. United States*, 412 U.S. 837 (1973); *Turner v. United States*, 356 U.S. 398 (1970); *Romano v. United States*, 382 U.S. 136 (1965).

The evidence that was presented in support of the proposition that the defendant was involved in the drug culture was first that the defendant's home has "the trappings and the furnishings within the home have all the characteristics of someone who would possibly be involved in the drug culture, in other words it projected a certain image." (T.–5) Secondly, the fact that the defendant possessed a rather aggressive German Shepherd dog. (T.–5) Thirdly, the fact that the defendant's clothes were somewhat informal (T.–12) and that he used musk oil (T.–17), thus giving the overall impression that he was living the life of one involved in the drug culture.

This evidence was accepted by the Judge where he states "I cannot overlook the fact that an experienced and trusted probation officer of this Court says in effect that everything about you took on the appearance of the same drug culture which this Court warned you about when you were up for it

before." (T.–88) Yet, the Judge accepted this evidence despite the fact that earlier in the hearing the probation officer stated "this is based on my limited experience in dealing with people in the drug scene as a probation and parole officer. I want to emphasize that." (T.–5)

Likewise, the same type of non-evidence was the basis of a finding of the violation of the requirement that the defendant hold a job. It was shown quite correctly that the defendant had had some trouble with such matters as not having his tally right, leaving doors open at night, etc. (T.–57) Yet, under testimony the owner of the store said that he had been improving recently and had just gotten a promotion and was in fact working at the time of this hearing. (T.–58)

While this situation is not precisely the same as those cases involving statutory presumptions, the theory behind those cases are applicable here.

The test is two-fold. First, there must be a rational connection between the fact proved and the ultimate fact presumed. *Tot v. United States*, supra at 463. Secondly, when the relationship between the evidence and the fact presumed is ambiguous a "more likely than not standard" based on a common sense approach is used. *Barnes v. United States*, 412 U.S. at 843; *Turner v. United States*, 356 U.S. at 417-419. Thus, as here, where the sole evidence is a presumption from facts not directly proving criminal activity, this two-fold test must be applied.

Apply this test to the aforedescribed evidence and we see that the evidence will fail on both counts. First, there is no rational connection between the fact that the defendant wore certain clothes or lived in a certain area or had a certain hair style and the fact to be proven, namely that he was involved in "the drug scene" in violation of his probation.

The assumptions made by the probation officer were incorrect on their own terms, not simply because they were insufficient to support a presumption of criminality. Evidence was presented that the residence in which the petitioner lived was

owned by a local attorney with other tenants in the development, including a dentist, a law student and a candidate for Congress. (T-72-73) Likewise, allegation concerning his owning a German Shepherd dog and his using musk oil had such obvious explanations as to stretch credulity to consider that they prove drug involvement.

Applying the second and common sense test, this Court said in effect that since the petitioner was once involved with drugs, common sense tells us that he must still be involved in drugs. This too is just not so. The Court recognized (T.–88) that the petitioner was newly married and had a good job, yet in a handwringing speech it still felt that otherwise innocent facts must show criminality since the petitioner was once involved in drugs. (T.–88, 89) This just is not so.

What this brief examination of the actual evidence presented against the defendant shows for the purpose of this petition is that the Court accepted as evidence unfounded and in many cases incorrect allegations and inclusions of a probation officer determining the nature of the defendant's conduct. While normally matters of fact of evidence do not rise to a constitutional level, in this particular case this evidence does in fact give rise to constitutional issue which goes to the very heart of the right of a defendant in a probation revocation hearing.

The facts in this case cry out for the same due process treatment given to those under which juvenile was sentenced in *Winship*. Leaving aside the constitutionality of the charges themselves, even if life style could be the basis of revocation, the evidence in this case so failed to prove any life style which would have been the legitimate subject of a probation hearing as to be almost the equivalent of no evidence found in the *Thompson case*. Probation officers in many places, not only Albemarle County, Virginia, have been able to get away with such evidence because there have been no rules concerning the substantive basis of probation revocation cases. This case affords a unique opportunity for the Court to remedy an otherise serious situation.

III

The basis of the revocation, namely that the probation officer disapproved of the defendant's life style, which he characterized as "hippie" and part of the drug culture was so vague as to be violative of the due process clause of the Fourteenth Amendment.

In a previous argument in this petition we discussed the question of the standard of evidence necessary to sustain a probation revocation hearing and whether or not the Commonwealt met that standard in this case. We now take this argument one step further and raise the question of vital importance for this Court, namely whether or not the basis of the charges brought against the defendant as the basis of his revocation were permissable and constitutional. We hold that they were neither, based both on the vagueness of the charges which rendered a plausible defense possible and the fact that the subject matter of the charges constituted an unconstitutional basis for inquiry.

Let us state at the outset in discussing the substance of charges that two or three apparent bases of allegations against the defendant are not being challenged here on substantive grounds. First of all, as to the question of the alleged possession of marijuana which we conceded under any circumstances would be the basis of a revocation although in previous discussions we showed and the Court agreed that such possession in this situation was accidental and without knowledge of the defendant. Likewise, the question of work or failure to do so would also be a permissable basis of revocation as a matter of substantive law. However, whether factually a person violated the terms of probation with regard to work is a matter for court determination, although in this particular case it was not violated as a matter of evidence. See *Douglas v. Buder*, supra.

Thus, we are left with the third ground, namely that the defendant's life style was impermissable and that according to the probation officer it constituted a "hippie" life style of which he rather strongly disapproved.

One can determine from the transcript what the elements were which went into the "hippie" life style so disapproved of by the probation officer. These included his physical appearance, including hair and possible beard, the location of his home and the decor of his home and the way he dressed. (T.–4, 5)

The first fatal weakness of this charge is that in a constitutional sense it is so vague as to be not subject to understanding. The question of what is a "hippie" culture, which is so disapproved of, just is an impossible term for the defendant to relate to in terms of defending himself. In some ways this is similar to some of the classic cases involving unconstitutional vagueness. In *Lanzetta v. New Jersey*, 306 U.S. 451 (1939), a New Jersey statute made it illegal to be a member of a gang "consisting of two or more persons who have been convicted of any crime in this or any other state is declared to be a gangster" and had heavy punishments for a person so characterized. The Court finding such a statute unconstitutional ruled:

> The terms of the penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well ordered requirement constant alike with ordinary notions of fair play and the settled rules of law. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and difference to its application, violates the first essential due process of law. *Connally v. General Construction Co.*, 268 U.S. 385 (1926). See also *Papachristou v. Jacksonville*, supra; *Gooding v. Wilson*, 405 U.S. 518 (1971); *Grayney v. Rockford*, 408 U.S. 1104 (1972).

Granted that when dealing with probation violations as opposed to general criminal statutes there would be certain differences as to the substantive basis of the actions. While of course it is not criminal not to hold a job if one is not convicted of a crime, nor is it criminal not to stay in touch with certain officials of state unless one is required to do so by a probation officer; nevertheless, even within the special requirements of

the probation system the concepts of due process and vagueness as to the basis of revocation are still applicable. Again, let me make it clear that what we are not complaining about is non-criminal conduct which would violate the probation system and it is clearly understood by all parties concerned that such conduct would be such a basis, again referring to failure to hold a job. What we are referring to here is his conduct which is not a basis of terms of probation, but which has suddenly been created out of whole cloth into a violation in terms of revocation. See *Douglas v. Buder,* supra.

It should be clearly understood that there were no requirements when he was convicted that the defendant must dress in a certain way and that he must decorate his home in a certain way, or that he must not live in a certain area and things of that nature. If there may be an explicit or implicit requirement of avoidance of the so-called drug culture as a condition of probation, it has not to be founded on real types of conduct which the probation system would prohibit, such as, and even this has elements of vagueness, association with persons known to be heavily involved in drug traffic. However, even conceding that association in and of itself could be the basis of revocation, that degree of non-criminal conduct is not present here. What you have is an allegation of a "hippie" life style which as a matter of definition is not the same as the so-called drug culture. The fact that a person like the defendant might want his clothes worn differently, have a different hairstyle or decorate his home differently than the probation officer would have done, and even if the choice of dress and decor meets the probation officer's disapproval, this is a matter of personal taste and style. It does not constitute criminal action which would be the basis of a revocation of probation. What you basically have is a personal prejudice on the part of the probation officer against the outward appearance of the defendant and that as a matter of law the requirements of the probation system do not require that the person on probation adopt a system style and personal dress and home decor which is approved as a matter of personal taste by the probation officer. The probation officer is still an agent of the state and his actions are governed by the specific requirements of the system itself and not his own personal whims and life style and just the mere fact that he has this

position does not allow him to exert his own tastes into official doctrine and affect law, the outcomes of which would constitute an act which would send a person back to jail. Putting it bluntly, the acts complaine of by the probation officer for which the defendant had his probation partially revoked just do not constitute acts the contemplation of which the probation system can consider a violation which has taken place, and a defendant cannot have his probation revoked on the basis of terms he cannot understand and meet. See *Winters v. New York*, 333 U.S. 507 (1948).

(A)

A probation officer's disapproval of the life style, dress, personal appearance, place of home, etc. cannot be the basis of revocation of probation.

Even if the concept of having one's probation revoked for life style indicative of a drug culture is not unconstitutionally vague, the next question which presents itself is whether or not aspects of the so-called drug culture which form the basis of the revocation, namely the dress, hairstyle, place of residence, etc. can be the basis of revocation in the absence of any specific connection to legitimate terms of probation; namely non-involvement with drugs, with drug users and the inability to maintain a job. We believe they cannot. While terms of probation may legitimately infringe upon areas which would otherwise be constitutionally protected, but for the fact of conviction, and may limit civil rights of those convicted of felonies, *Richardson v. Ramirez*, 410 U.S. 24 (1974); nevertheless this trial Court held that a term of probation may include a limitation on where a person may live, the way he may dress, his personal appearance, etc. with such personal preferences having no relationship to legitimate concerns of the probation system. These terms would exceed any legitimate interest the state might have in regulating the day to day lives of persons under probation. The fact that the state was under no obligation but to have originally put the defendant on probation and could well have given him a full sentence without any suspended time does not mean that when it put him on probation it had the power to show each and every aspect of his day to day life without establishing any

relevance between the regulation and needs of the probation system. See *Sherbert v. Verner*, 374 U.S. 398 (1963); *Tinker v. School District*, 393 U.S. 503 (1969). Likewise, even though a prisoner's dress or personal appearance are legitimate subjects of a state regulation that could be legitimately proscribed, it does not mean that the probation officer has the very same power over one on probation. Indeed, the basis of the legitimacy of such regulation for prisoners is not a fact of conviction, but rather the fact the authorities may establish such rules and regulations as to insure a uniformity in orderly administration as would be the case in the military service. It is perfectly legitimate to say that allowing too much individuality in matters of appearance and dress inside such a closed system as a prison or military unit may lead to a tendency upon those covered by such regulations to consider all rules and regulations subject to individual interpretation and obedience. Whether such is true as a matter of practical effect, it still remains a legitimate inclusion for a prison system or a military unit to reach, thus not unconstitutional. However, the same would not pertain to a probationer living at home. If you can say that a probation officer has the right to determine how a probationer may dress or his personal appearance or where he lives (in the absence of any specific relationships to a legitimate term of probation), then you could just as easily say that he may determine whether or not he should have sexual relations with his wife, what food he eats, what kind of car he drives, or how he should discipline his children. Obviously, a point is reached beyond which legitimate state interests is superseded by a form of personal liberty. This liberty is not liberty involved with ones public self, such as the right to vote; the right to hold public job or office; or the right to be free from bodily restraint. This is a private form of liberty which "while this Court does not attempt to define with exactness the liberty — guaranteed [by the Fourteenth Amendment] the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized — essential to the

orderly pursuit of happiness by free men." *Meyer v. Nebraska,* 262 U.S. 390-399 (1925). "In a constitution for free people, there can be no doubt that the meaning of liberty must be broad and deep." *Board of Regents v. Roth,* 408 U.S. 572 (1972).

This same concept found in Roth is found with regard to these probation situations. The mere fact that the probationer is given his personal freedom means that the absence of the legitimate state interest regarding to certain types of activities and behavior makes it so that he is to be treated as any other person irrespective of whether or not he has ever been convicted of a crime. Revoking one's probation here for the style of furniture, the location of personal residence or the fact that he at one time may or may not have had a mustache, though that of course was changed when it had a bearing upon the job but for no other reason, and such similar facts go beyond the legitimate interests of the probation system and as such this Court should state that such personal matters cannot be the subject of probation terms in the absence of any connecting evidence to the legitimate interest of probation.

CONCLUSION

For the reasons outlined above the writ of certiorari should be granted.

Respectfully submitted,
ROBERT P. DWOSKIN
1224 West Main St.,
Charlottesville, Virginia 22903
Attorney for Petitioner

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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-190

GREGORY VAN HALL,
Petitioner

versus

THE COMMONWEALTH OF VIRGINIA
Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE VIRGINIA SUPREME COURT

ROBERT P. DWOSKIN
1224 West Main Street
Charlottesville, Virginia 22903
Attorney for Petitioner

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VIRGINIA: AT A CIRCUIT COURT HELD AND CONTINUED FOR THE COUNTY OF ALBEMARLE, ON THE CRIMINAL LAW SIDE THEREOF, WEDNESDAY, JULY 24, 1974:

PRESENT: HON. DAVID F. BERRY, JUDGE

COMMONWEALTH OF VIRGINIA

VS. INDICTMENT # 2344
Probation violation

GREGORY VAN HALL

On this the 24th day of July 1974, came again the Attorney for the Commonwealth, and Gregory Van Hall, who was heretofore convicted for a felony, to-wit: breaking and entering and was sentenced to confinement in the penitentiary of this Commowealth for a term of two years, the execution of which sentence was revoked by this Court on April 25, 1973, and the defendant having served time in jail until September 14, 1973, at which time the Court further suspended the balance of said sentence, and placed the defendant on probation for an additional three years from September 14, 1973, appeared in Court in person, and likewise appeared E. Gerald Trembley, his attorney.

Whereupon, the defendant appearing because-of a complaint filed by the Probation and Parole Office, that the defendant was in violation of the rules and regulations of said probation, the Court received and considered the evidence of the Probation Officer, and the additional evidence adduced in open Court in the presence of the defendant. The defendant and his counsel were given the right to cross examine fully the probation officer and to present any additional facts bearing upon the matter as they desired to present.

Whereupon, after taking into consideration all the evidence in the case and the argument of counsel, the Court doth ADJUDGE and ORDER that the execution of four months of the balance of the two year sentence originally suspended by this Court be hereby revoked, and that upon the defendant's release from custody he be placed on three years supervised

probation from the date of his release, the conditions of said probation, being the same as stated in the order dated September 14, 1974, and of record in Criminal Law Order Book 7 at page 305.

Whereupon, the defendant by counsel having stated his intention to apply to the Supreme Court of Virginia for a Writ of error, execution of the above judgment is hereby suspended until such time as the Supreme Court of Virginia shall allow such appeal, and if the appeal is granted then the judgment shall be further suspended until final action on said appeal is taken.

The defendant by counsel, moved the Court for bond, said motion being granted, and it is ordered that the bond shall be in the penalty of $2,000.00 cash and $4,000.00 property, the surety to be approved by the Clerk of this Court.

The Court allows the defendant until July 25, 1974, at 10:00 A. M. to make bond or report to the jail of this County.

s/David F. Berry, Judge

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 7th day of May, 1975.

The petition of Gregory Van Hall, sometimes known as Gregory V. Hall, for a writ of error and supersedeas to a judgment rendered by the Circuit Court of Albemarle County on the 24th day of July, 1974, in a certain revocation of probation proceeding then therein depending, wherein the Commonwealth of Virginia was plaintiff and Gregory Van Hall was defendant, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition, and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit court, which court shall allow court-appointed counsel the sum of $150 as compensation for services rendered on this appeal, and also his necessary direct out-of-pocket expenses.

And it is ordered that the Commonwealth recover of the plaintiff in error the said amount paid counsel appointed to represent him on this appeal, his necessary direct out-of-pocket expenses, the amount paid counsel appointed by the said circuit court to represent the said petitioner therein, his necessary direct out-of-pocket expenses, and the costs to be assessed in this case by the clerk of the said circuit court.

A Copy,

Teste:

Howard G. Turner, Clerk

By: s/Allen L. Lucy

Deputy Clerk

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In The

Supreme Court of the United States

October Term, 1975

No. 75-190

GREGORY VAN HALL,

Petitioner,

v.

THE COMMONWEALTH OF VIRGINIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PRELIMINARY STATEMENT

The respondent, the Commonwealth of Virginia, respectfully prays that a Writ of Certiorari to a judgment of May 7, 1975, of the Supreme Court of Virginia not to grant a Writ of Error not be granted.

OPINION BELOW

The judgment of the Supreme Court of Virginia not to grant a Writ of Error is not reported.

JURISDICTION

The petitioner asserts that the jurisdiction of this Court to issue the Writ of Certiorari is grounded upon 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I. **Is A Defendant Entitled In A Probation Revocation Hearing In Which There Are Factual Disputes To A "Full Panopy Of Procedural And Substantive Rights"?**

II. **Is The Standard Of Proof In A Probation Revocation Hearing That Of Proof Beyond A Reasonable Doubt?**

III. **Was The Evidence Sufficient For Revocation Of Probation?**

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Fourteenth Amendment:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On September 13, 1973, the Petitioner was heard in the Circuit Court of the County of Albemarle, Virginia, on charges that he had violated the terms and conditions of probation. The Court did not revoke probation but instead placed the Petitioner again under stringent terms and conditions of probation designed to separate him from drugs and from people associated with drugs.

The Petitioner, again having been charged with violation of terms and conditions of probation, was brought before the Court on July 24, 1974. There was testimony to the effect that Petitioner's life-style was consistent with individuals associated with drugs, that the Petitioner owned an aggressive dog, again not inconsistent with the use of

drugs, and that the Petitioner had had difficulties in holding his employment.

The Court referred to the terms and conditions of probation imposed on the Petitioner in the hearing held on September 13, 1973, found those terms and conditions to have been violated, and revoked Petitioner's probation.

I.

A Defendant Is Not Entitled In A Probation Revocation Hearing In Which There Are Factual Disputes To A "Full Panopy Of Procedural And Substantive Rights."

Petitioner alleges that a probation revocation hearing in which there are factual disputes relating to the grounds of revocation is transformed from a quasi-criminal administrative hearing into a "full judicial hearing" and that the defendant is entitled to a "full panopy of procedural and substantive rights."

Petitioner is not entitled to raise the issue. The same was not raised at the trial court level. It, therefore, cannot be assumed that the Supreme Court of Virginia considered the issue. Rule 5.7, *Rules of the Supreme Court of Virginia, 2 Va. Code Ann.* (Cum. Supp. 1975), provides in pertinent part as follows:

> This Court will not notice any objection requiring a ruling of the trial court unless the ground of objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice. . . .

If a party has not given the opportunity to a State trial court and the State appellate court to consider the issue, he is not entitled to be heard in this Court on a Petition for a Writ of Certiorari. *Trailmobile Co.* v. *Whirls,* 331 U.S. 40

(1947); *Ellis* v. *Dixon,* 349 U.S. 458 (1955), *reh. den.* 350 U.S. 855 (1955).

Even if Petitioner were entitled to be heard on the issue, the same is so vague as to not form a basis upon which a decision could be made.

In *Morrissey* v. *Brewer,* 408 U.S. 471 (1972), this Court in considering the issue of applicability of due process procedural safeguards in parole revocation hearings stated in 408 U.S. at p. 480 as follows:

> "We begin with the proposition that the revocation of parole is not part of a criminal prosecution and thus the full panopy of rights due a defendant in such a proceeding does not apply to parole revocation. [Authority cited] Parole arises after the end of the criminal prosecution, including imposition of sentence. . . ."

This Court has generally taken the view that revocation of parole and revocation of pardon are essentially the same. *Gagnon* v. *Scarpelli,* 411 U.S. 778 (1973). Thus, this Court conclusively has taken the position that an individual is not entitled to a full panopy of procedural and substantive rights in probation revocation proceedings.

Petitioner is not entitled to raise the issue that a Defendant is entitled in a probation revocation hearing in which there are factual disputes to a full panopy of procedural and substantive rights. Even if he were so entitled, this Court has decided the issue adversely to Petitioner.

II.

The Standard Of Proof In A Probation Revocation Hearing Is Not That Of Proof Beyond A Reasonable Doubt.

Petitioner raises the issue of whether the standard of proof in a probation revocation hearing is that of proof beyond a reasonable doubt.

Petitioner should not be heard on that issue. Not only did he not raise the same in the State trial Court, he, in closing argument, agreed that the standard of proof was not that of proof beyond a reasonable doubt:

> "There is not one thing on here that there is any direct evidence, any direct evidence other than the assumption by Mr. Wade Your Honor in this Court—there is not one centiliter (sic) of evidence before you today that there has been a breach of any one of these conditions, that he hasn't met all of them, not one. What you have got to do in order to find them guilty and to revoke his probation, you have go to believe the flavor of what Mr. Wade tells you rather than any evidence presented by Mr. Hall. *Now it seems to me—I know that this sort of a hearing does not have the same requirement, reasonable doubt burden and so forth,* Your Honor when there isn't one centiliter (sic) of evidence that's contrary, to anything that's here, there's not anything about associates. . . ." (Emphasis supplied) (Trial Transcript p. 92)

The issue, therefore, should not be heard before this Court. *Trailmobile Co., supra,* and *Ellis, supra.*

In any event, the burden of proof necessary for revocation of probation is not that of proof beyond a reasonable doubt. To hold that proof beyond a reasonable doubt is necessary would be to hold that a probation revocation hearing is a part of a criminal prosecution. Probation comes subsequent to the culmination of criminal prosecution and is not a part of the prosecution. It has been held that proof beyond a reasonable doubt is not necessary in order to revoke probation.

U.S. v. *Lauchli,* 427 F.2d 258 (7th Cir. 1970), *cert. den.* 400 U.S. 868 (1970); *State* v. *Rasler,* 216 Kan. 292, 532 P.2d 1077 (1975); 24 C.J.S. § 1618(11), p. 916. It has

been held in Virginia that proof beyond a reasonable doubt is not necessary in order to revoke probation. *Marshall* v. *Commonwealth*, 202 Va. 217, 116 S.E.2d 270 (1960).

Petitioner is not entitled to raise the issue of whether the standard of proof in probation revocation hearings is that of proof beyond a reasonable doubt. Even if he were so entitled, the weight of authority supports the view that proof beyond a reasonable doubt is not necessary in such hearings.

III.

The Evidence Was Sufficient For Revocation Of Probation.

Petitioner alleges that the evidence was insufficient for revocation of probation. There was ample evidence upon which to justify revocation of probation.

The Court had previously held a probation revocation hearing on September 13, 1973. The Court found as a fact from the evidence that the Petitioner's problems had been drug-related. Rather than revoking probation, however, the Court again placed the Petitioner on probation, subject to strict conditions designed to separate him from drug-related activities and persons associated with drugs. The Court specifically required the Petitioner to maintain a job approved by it and to present himself in Court at least once every three months "from the standpoint of your personal appearance for the approval of the Court." (Tr. 3, transcript of portion of hearing held on September 13, 1973). The Court also specified additional conditions. (Tr. 4-5, transcript of portion of hearing held on September 13, 1973). It is obvious from the Court's remarks and conditions that the whole intention of the Court was to make one last attempt to keep the Petitioner away from any circumstance which might in any way lure him into the use of drugs again.

There was evidence to the effect that the Defendant was having difficulties at work. (Tr. 5-6, hearing held on July 24, 1974). There was evidence that the Petitioner's physical appearance was consistent with individuals involved in drugs, specifically, his dress, hair and beard. (Tr. 4, hearing held on July 24, 1974). The Petitioner also owned a dog which had to be brought under control before the probation and parole officer entered the premises of the Petitioner, and there was evidence that ownership of such a dog again was consistent with the life-style of individuals involved in drugs. (Tr. 4-5, of hearing held on July 24, 1974).

There was additional testimony that the premises in which the Petitioner lived were characteristic of a "drug type pad," and that specifically musk oil, commonly used to conceal the odor of drugs was present. (Tr. 17, hearing held on July 24, 1974).

There was sufficient evidence upon which to base revocation. The Court had earlier placed the Petitioner under strict conditions designed to separate him from drugs and from those who used drugs. Evidence presented showed that the Petitioner failed to abide by the conditions.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Attorney General of Virginia

LINWOOD T. WELLS, JR.
Assistant Attorney General

Supreme Court–State Library Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, Linwood T. Wells, Jr., Assistant Attorney General of Virginia, counsel for the Respondent in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 14th day of November, I mailed three copies of the foregoing Brief in Opposition to the granting of a Petition for a Writ of Certiorari to Robert P. Dwoskin, 1224 West Main Street, Charlottesville, Virginia 22903, Attorney for Petitioner.

LINWOOD T. WELLS, JR.
Assistant Attorney General